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No. 95-822

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

RICHARD W. COSSEY, *Petitioner*
v.
STATE OF LOUISIANA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

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QUESTION PRESENTED

When a state, in a civil administrative proceeding, suspends a driver's license as a civil sanction for driving while intoxicated (DWI), and the State's highest court has held that the suspension serves not only remedial purposes but punitive purposes as well, does the suspension constitute "punishment" that renders unconstitutional, on double jeopardy grounds, a later criminal DWI prosecution based on the same conduct?

LIST OF PARTIES

The parties to the proceedings below are petitioner Richard W. Cossey and the respondent the State of Louisiana.

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The petition of Richard W. Cossey respectfully prays that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court rendered September 22, 1995 denying petitioner's application for a writ of review in the above-entitled proceeding.

OPINIONS BELOW

The decisions of the trial court, the court of appeal, and the Louisiana Supreme Court are unreported, but are reproduced in the appendix hereto, pp. A-1 through A-6, *infra*.[1]

JURISDICTION

Petitioner has been charged by bill of information with driving while intoxicated. On February 22, 1995, petitioner's motion to quash the charge on the ground of double jeopardy was denied by the trial court. On May 4, 1995 the Louisiana Third Circuit Court of Appeal denied petitioner's application for a writ of review, and on September 22, 1995 the Louisiana

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[1] The trial court did not render a written opinion. That portion of the transcript containing the court's ruling is included in the Appendix.

Supreme Court also denied petitioner's application for a writ of review. Petitioner did not apply for rehearing.

The Louisiana Supreme Court is the highest court of the State of Louisiana in which a decision could be had in this case. The judgment of the Louisiana Supreme Court refusing to review the trial court's denial of petitioner's plea of double jeopardy is a final decision within the meaning of 28 U.S.C. 1257. *Abney v. United States*, 431 U.S. 651 (1977). Accordingly, this court has jurisdiction to decide the merits of this application under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment - Double Jeopardy Clause

STATUTES INVOLVED

Louisiana Revised Statutes 14:98 [R.S. 14:98]

Louisiana Revised Statutes 32:661 [R.S. 32:661(A)(1)]

Louisiana Revised Statutes 32:667 [R.S. 32:667(A)]

Louisiana Revised Statutes 32:414.D [R.S. 32:414(D)(1)]

STATEMENT OF THE CASE

Louisiana R.S. 14:98 makes it a crime to operate a motor vehicle while intoxicated. Under Louisiana's implied consent law, any person suspected of driving while intoxicated (DWI) may be required to submit to a breathalyzer test. R.S. 32:661. If the test shows that the operator's blood alcohol concentration (BAC) is greater than .10% by weight, the State may suspend the operator's driver's license as a civil sanction for DWI. R.S. 32:667. In addition, the State may prosecute the offender for DWI in a separate criminal proceeding.[2]

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[2] Under R.S. 14:98, proof that the defendant had a blood alcohol concentration of .10% or more is conclusive proof that he is guilty of DWI. Thus not only the conduct sought to be punished but the evidence used to prove it is the same in both the civil license suspension proceeding and the criminal DWI

On February 22, 1994, petitioner was involved in an automobile accident. After a breathalyzer test showed that his BAC was greater than .10%, he was arrested and charged with DWI. This is petitioner's third DWI offense.

For a third offense, the suspension period under R.S. 32:667 is one year with no eligibility for a hardship license. Third offense DWI is a felony and carries a mandatory prison sentence of 1-5 years. R.S. 14:98. Additionally, upon conviction of third offense DWI, the defendant's driver's license is automatically suspended for two years. R.S. 32:414.D.

The State of Louisiana suspended petitioner's driver's license for one year pursuant to R.S. 32:667 after an administrative law judge in a civil administrative proceeding found that petitioner's BAC at the time of the accident exceeded the legal limit. Thereafter, the State also instituted this criminal prosecution for DWI under R.S. 14:98.

Petitioner moved to quash the criminal charge contending that the suspension of his driver's license for one year under R.S. 32:667 constituted punishment for the DWI, and that this criminal prosecution is an attempt to punish him a second time for the same offense in violation of the double jeopardy clause of the Fifth Amendment of the Constitution.

The trial court denied petitioner's motion, citing as authority the Louisiana Supreme Court's decision in *Butler v. Department of Public Safety and Corrections*, 609 So.2d 790 (La. 1992). See Appendix, p. A-4). In *Butler* the court had held that, although the suspension of a driver's license under R.S. 32:667 is punitive, its primary purpose is remedial; therefore, it does not constitute punishment for double jeopardy purposes and does not bar a later criminal prosecution for DWI.

After denial of his motion, petitioner applied to the Louisiana Third Circuit Court of Appeal for a writ of review, but his application was denied without reasons. (See Appendix p. A-5). Petitioner then applied to the Louisiana Supreme Court for a writ of review, but again his application was denied without reasons.. (See Appendix p. A-6).

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prosecution.

REASONS FOR GRANTING THE WRIT

I. The decision below rejecting petitioner's double jeopardy plea is in direct conflict with decisions of this and other courts which have held that a sanction for illegal conduct that is not solely remedial, but also serves either retributive or deterrent purposes, constitutes punishment for double jeopardy purposes.

The double jeopardy clause protects against both multiple prosecutions and multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440 (1989). While in some instances multiple punishments are allowed, they are barred if imposed in separate proceedings. *Missouri v. Hunter*, 459 U.S. 359 (1983).

The administrative proceeding resulting in the suspension of petitioner's driver's license and the criminal prosecution brought against him are, without doubt, separate proceedings. One is civil; the other is criminal. They were initiated pursuant to different statutes at different times in different tribunals employing different procedural rules. Accordingly, in ruling on this application, this Court may limit its inquiry to a single question--whether the administrative suspension of petitioner's driver's license constitutes punishment as that term has been defined by this Court in *Halper*.

In *Halper* this Court held that whether a sanction for illegal conduct constitutes punishment is not determined by whether by it is labeled "civil" or "criminal" but by its purpose. "A sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes is punishment" for double jeopardy purposes. 490 U.S. at 448. Thus, a civil sanction designed to deter or punish illegal conduct will support a double jeopardy plea in a separate criminal prosecution for the same offense, even if the sanction also has a remedial purpose. *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 1801 (1993); *Dept. of Revenue of Montana v. Kurth Ranch, Inc.*, 521 U.S. ___, 144 S.Ct. 1937 (1994); *U.S. v. $405,089.23 U.S. Currency*, 33 F.3d 1210, 1219 (9th Cir. 1994); *U.S. v. Hudson*, 14 F.3d 536 (10th Cir. 1994).

Before *Austin* and *Kurth Ranch* were decided, local and state courts had held uniformly that suspension of a driver's license for DWI under a state's implied consent law did not bar a separate criminal prosecution for the same DWI offense. The rationale underlying most of those decisions was that a driver's license suspension for DWI is solely a remedial measure--it

removes drunk drivers from the highways--and therefore suspension is not punishment for double jeopardy purposes. But after *Austin* and *Kurth Ranch* were decided, courts began to recognize, as the Louisiana Supreme Court had in *Butler v. Dept. of Public Safety and Corrections, supra,* that the suspension of a driver's license for DWI serves both remedial and punitive goals.

The state courts now are clearly divided on the question whether an administrative license suspension is punishment. In Ohio for instance, a state appellate court, applying *Halper* and its progeny, found that the administrative suspension of the defendant's driver's license under Ohio's implied consent law was punishment because the suspension was clearly a penalty designed to deter drunk driving. *State of Ohio v. Gustafson*, 1995 WL 387619 (Ohio App. 7 Dist., 6/27/95).[3] Numerous other courts in other states have used the same rationale and have dismissed criminal prosecutions on double jeopardy grounds. But many courts, including the Louisiana courts in this case, have held otherwise.[4]

The only federal decision addressing the issue held that a one-year suspension "can only be deemed deterrent or punitive in nature" and thus triggers double jeopardy protection. *United States v. Johnson*, no. 95-76-M (E.D. Va. 9/1/95). In reaching that conclusion, the court said,"

> The suspension of an individual's installation driving privileges for one year does nothing to protect military installations, or society in general, from danger. It is common knowledge that blood alcohol content diminishes within a matter of hours, not months. Accordingly, the danger posed by any intoxicated individual, and

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[3] See Appendix p. A-9. *Gustafson* is now pending in the Supreme Court of Ohio.

[4] Included in the Appendix at page A-29 is a list of all cases known to peitioner decided after *Kurth Ranch* in which the courts have addressed the issue of whether the administrative suspension of a driver's license for DWI bars a subsequent criminal prosecution for the same DWI offense. All the cases applying the double jeopardy clause, except *State v. Gustafson,* are unreported, but written opinions issued in each those cases reflect that the courts based their decisions on *Halper*, *Austin*, and *Kurth Ranch* and used the same analysis as the court in *Gustafson.*

> the necessity for remedial action, extends only for a period of hours. That is not to say that the same individual again could not impose [sic] a danger to the public by becoming intoxicated, and driving. Indeed it is apparent that Army Regulation 190-5 was drafted in part to deter such a subsequent action. For this reason, Army Regulation 190-5 constitutes punishment within the meaning of the Double Jeopardy Clause. Being designed, at least in part, to deter, the suspension constitutes punishment and precludes subsequent criminal prosecution.

(See Appendix, p. A-25).

This Court already has recognized that one purpose of administrative license suspensions is to deter drunk driving and that the loss of a driver's license for even one day could have serious punitive effects. *Mackey v. Montryn*, 443 U.S. 1, 18, 30 (1979). Thus the courts that have held that driver's license suspensions are solely remedial ignore reality to reach that conclusion.

The decision in this case that the suspension of petitioner's driver's license for one year is not punishment is clearly wrong and conflicts with the principle enunciated in *Halper, Austin,* and *Kurth Ranch* that a civil sanction, if it is designed even in part to punish illegal conduct, constitutes punishment which bars a separate criminal prosecution for the same conduct. It also is at odds with the many cases in other states decided since *Austin* and *Kurth Ranch* which have expressly held that the administrative suspension of a driver's license for DWI bars a subsequent criminal prosecution for the same DWI offense.

II. A decision by this Court is vital to the administration of the criminal justice system. Each year, more than one million drivers are charged with DWI. *E.g., Statistical Abstract of the United States* (112th. ed.)(Table No. 302, Persons Arrested, by Charge, Sex, and Age: 1990); Bureau of Justice Statistics, Press Release, *Prior Records Common Among Drunk Drivers* (Sept. 30, 1992)(reporting 1.7 million DWI arrests in 1989). The question presented here thus can arise in hundreds of thousands of cases each year.

The uncertainty accompanying the present state of nonuniformity threatens law enforcement officials' efforts to deal with a widespread, serious social problem. They do not know whether they must choose between quick, administrative license suspension and a more serious criminal prosecution of DWI arrestees. Uniform guidance is needed to

enable states and their law enforcement officials to design constitutionally valid civil and criminal procedures to deal with DWI charges.

CONCLUSION

The suspension of petitioner's driver's license for one year under R.S. 32:667 is intended to punish him for driving while intoxicated and to deter him from doing it again. The fact that it might also have a remedial purpose cannot remove it from this Court's definition of punishment established in *Halper*, *Austin*, and *Kurth Ranch*. The conflict between the decision in this case and the decisions of this Court as to what constitutes punishment for double jeopardy purposes is readily apparent and can only be resolved by this Court.

Moreover, the effect of a decision by this Court will not be limited to this case. Double jeopardy pleas are now being asserted in countless DWI cases throughout the country. As the list of cases contained in the Appendix shows, the courts are divided on whether a driver's license suspension triggers double jeopardy protections. The courts need instruction from this Court as to whether the double jeopardy clause applies to ensure uniform nationwide application of the clause to the more than one million possible DWI prosecutions that arise each year.

Respectfully submitted,

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